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IN THE

Supreme Court of the United States

APRIL TERM, 1979

NUMBER 78-1783

NORMAN R. SIMONS and CATHERINE SIMONS,
Petitioners

v.

UNITED STATES OF AMERICA, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH JUDICIAL CIRCUIT

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and
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TOPICAL INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of Facts	3
Reasons for Granting the Writ	6
I. *A Circuit Court of Appeals of the United States may not deny oral argument completely in civil cases on appeal where both parties to the appeal specifically request oral argument and do not waive their right to present verbal advocacy for their respective positions as to fact and law.*	6
II. *An order denying all relief requested in a Motion for Return of Seized Property filed pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure, is appealable in the absence of any formal criminal charges against the movants of said Motion at the time of appeal.*	9
III. *A Circuit Court of Appeals of the United States may not refuse to address a Constitutional issue when properly raised on appeal.*	10
IV. *Congress cannot provide, by Legislation, Statutory remedies and Administrative safeguards for taxpayers using banks, credit card companies, attorneys, and accountants as third-party record keepers, under 26 U.S.C.A. 7609, and deny the same Statutory remedies and Administrative safeguards to taxpayers unfortunate enough to have employers, thus invidiously discriminating against those taxpayers unfortunate enough to have third-party record keepers.*	11
V. *The District Court, Carl O. Bue, and its Magistrate, erred in holding that the phrase "other employment records" in the summons complained of was not impermissibly broad under Amendment Four of the United States Constitution.*	13

Page

VI. *The District Court, Carl O. Bue, and the Court of Appeals, erred in holding that a hearing on a Motion for Return of Seized Property, pursuant to Rule 41 (e), Federal Rules of Criminal Procedure, was a remedy for Petitioners herein equivalent to their intervention at an enforcement proceeding under 26 U.S.C.A. 7602.* 15

VII. *Petitioners' rights under the International Bill of Human Rights and the American Declaration of the Rights and Duties of Man were violated, where the United States Government attempted to obtain a conviction of Petitioners for alleged non-political offenses, exclusively due to Petitioners' political activities.* 17

INDEX TO APPENDICES

Appendix A—Order of the United States District Court .. 23

Judgment of the United States District Court 24

Appendix B—Amendment IV of the Constitution of the United States 25

Appendix C—Amendment V of the Constitution of the United States 25

Appendix D—Amendment VI of the Constitution of the United States 26

Appendix E—Amendment XIV of the Constitution of the United States 26

Appendix F—Judgment of U.S.C.A.-5th Circuit 27

TABLE OF AUTHORITIES CITED

CASES

Page

DiBella v. United States, 269 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962) 10

DiBella v. United States, 369 U.S. 121, 131-132, 82 S.Ct. 654, 7 L.Ed.2d 614 9

Gobart Importing Co. v. United States, 282 U.S. 344, 356, 51 S.Ct. 153, 75 L.Ed. 374 9

CASES

Page

Gottone v. United States, 345 F.2d 165, (C.A. 10, 1965) .. 9

Herring v. New York, 422 U.S. 853 (1975) 6, 7

Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al, 431 F.2d 409, (C.A. 5, 1970) 7

Leahy v. United States, 272 F.2d 487 (C.A. 9, 1959) 10, 11

Missouri v. Holland, 252 U.S. 416 (1920) 17

Peckham v. Family Loan Co., 262 F.2d 422, (C.A. 5, 1962) 7

Reisman v. Caplin, 375 U.S. 440 (1964) 16

Simons v. United States, 78-1973, (C.A. 5, March 30, 1979) 9

United States v. Donaldson, 400 U.S. 517, 91 S.Ct.R. 534 16

United States v. Glassman, 533 F.2d 262 (C.A. 5, 1976) .. 9

United States v. Schooner Peggy, 1 Cranch 103 (1801) ... 17

STATUTES

Title 26, U.S.C.A. § 7602 ..... 15, 17

Title 26, U.S.C.A. § 7609 ..... 10, 11, 12, 15, 17

RULES

Federal Rules of Appellate Procedure 34(b) 7

Federal Rules of Criminal Procedure 41(e) 16

TREATIES

The International Bill of Human Rights 18

The American Declaration of the Rights and Duties of Man 19

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The Petitioners, Norman R. Simons and Catherine Simons, respectfully request that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Fifth Circuit entered March 30, 1979, *under said Court's summary calendar without oral argument*, which affirmed the decision of the United States District Court for the Southern District of Texas, Carl O. Bue.

OPINION BELOW

The Fifth Circuit Court of Appeals, by its Judgment affirmed the decision of the United States District Court

for the Southern District of Texas, Carl O. Bue. A copy of said decision is attached hereto at Appendix "A".

JURISDICTION

The Judgment of the Fifth Circuit affirming the decision of the United States District Court for the Southern District of Texas, Carl O. Bue, was dated March 30, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May a Circuit Court of Appeals of the United States deny oral argument completely in civil cases on appeal where both parties specifically request oral argument and do not waive their right to present verbal advocacy for their respective positions as to fact and law?

2. Is an Order denying all relief requested in a Motion for Return of Seized Property, filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, appealable in the absence of any formal criminal charges against the Movants of said Motion at the time of appeal?

3. May a Circuit Court of Appeals of the United States refuse to address a constitutional issue when properly raised on appeal by Petitioners/Appellants therein?

4. Whether Congress can provide, by legislation, statutory remedies, and administrative safeguards for taxpayers using banks, credit card companies, attorneys, and accountants as third-party record keepers, under 26 U.S.C.A. 7609, and deny the same statutory remedies and administrative safeguards to taxpayers unfortunate enough to have employers, thus invidiously discriminating against

those taxpayers unfortunate enough to have employer third-party record keepers?

5. Whether the District Court, Carl O. Bue, and the Court of Appeals, erred in holding that the phrase "other employment records" in the summons complained of was not impermissibly broad under Amendment 4 of the United States Constitution?

6. Whether the District Court, Carl O. Bue, and the Court of Appeals, erred in holding that a hearing on a Motion for Return of Seized Property, pursuant to Rule 41(e), FEDERAL RULES OF CRIMINAL PROCEDURE, was a remedy for Petitioners herein equivalent to their intervention at an enforcement proceeding under 26 U.S.C.A. 7602?

7. Were Petitioners' Rights under the International Bill of Human Rights and the American Declaration of the Rights and Duties of Man violated, where the United States Government attempted to obtain a conviction of Petitioners for alleged non-political offenses, exclusively due to Petitioners' political activities?

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of Amendments IV, V, VI, and XIV of the Constitution of the United States are set forth in Appendixes "B" through "E" respectively.

STATEMENT OF FACTS

The over-zealous exercise of the right to inquire improvidently delegated the administrative officers of the Internal Revenue Service of the United States has often collided with the barricades of silence edified by citizen

taxpayers who, in nihilistic manner, refuse to cooperate with an agency whom they feel is dedicated to their destruction. Too often, the resistance of the taxpayers to the attempted exercise of the state's right to inquire has led to decisions of prejudice, spawned by the unrealistic, but cherished, dreams of the Judges and Justices of the United States who render decisions calculated to achieve results they deem socially desirable. These men of the judicial cloth refuse to litigate and decide the substantive rights of the parties involved, hoping to discourage such outraged citizens from exercising their fundamental rights which are the true axis of the system which the Judges and Justices are so desirous of propagating. An alarming trend has developed throughout many of the Circuit Courts of Appeals of the United States, which this Honorable Supreme Court may be unaware of, to dismiss appeals without passing on the issues properly raised by the parties to such proceedings, to deny oral argument to such litigants, effectively gagging the mouth of justice if not closing her ears,[7] and raising fundamental doubts, in the minds of the citizens of the United States, as to the continued efficacy and viability of our system of appeals. Courts of law in the American system have been specifically prohibited, from early times, from rendering decisions calculated to achieve a desired result in our society. The sole duty of Courts of Law is to pass upon the rights, both substantive and procedural, of litigants before them, where they may be in conflict, without regard to the effect such decisions would have on the exercise of the same or different rights by society at large. Historically, the Supreme Court of the United States has had to curb such desires, harbored by the lower Courts of our legal system, to decide issues on

any other basis than the basic rights which, by oath, Judges of the state and federal systems are sworn to uphold.

The original Motion for Return of Seized Property was filed by the Petitioners herein on September 30, 1977. A so-called "conference" was held on October 13, 1977, at 10:00 a.m. to discuss whether or not a hearing should be granted on the Motion for Return of Seized Property. It was decided by the Magistrate, Norman W. Black, that Petitioners below were entitled to a hearing on the Motion, and duly scheduled same for October 21, 1977, at 9:00 a.m. Several important exhibits were removed from the record, apparently by personnel in the office of the Clerk for the Southern District of Texas, whose authorization remains a mystery. The Magistrate, Norman W. Black, denied all relief sought by the Petitioners herein in their Motion, by filing his findings with the United States District Court for the Southern District of Texas, Carl O. Bue, wherein recommendations denying all relief were expounded. The United States District Court for the Southern District of Texas, Carl O. Bue, adopted said findings in all respects, denying all relief. From that Order of the United States District Judge, Petitioners herein took their appeal to the United States Court of Appeals for the Fifth Judicial Circuit. The case then proceeded "in brief" on appeal. Both the United States and the Petitioners herein requested oral argument. Acting arbitrarily, the Court of Appeals assigned the case to their "summary calendar", denying all oral argument, and disposing of the Petitioners' appeal on the basis of want of jurisdiction. The questions presented herein by the Petitioners were present in the appeal below but were blithely ignored by the Court of Appeals. As

will be seen hereafter, there is substantial conflict among Circuit Courts of Appeals of the United States concerning their interpretation of this Court's decisions as to the appealability of an Order denying relief on a Motion for Return of Seized Property.

It should be carefully noted that at the time of the filing of this Petition, Petitioners have yet to be indicted for any crime under the laws of the United States.

REASONS FOR GRANTING THE WRIT

I.

A CIRCUIT COURT OF APPEALS OF THE UNITED STATES MAY NOT DENY ORAL ARGUMENT COMPLETELY IN CIVIL CASES ON APPEAL WHERE BOTH PARTIES TO THE APPEAL SPECIFICALLY REQUEST ORAL ARGUMENT AND DO NOT WAIVE THEIR RIGHT TO PRESENT VERBAL ADVOCACY FOR THEIR RESPECTIVE POSITIONS AS TO FACT AND LAW.

The right to oral argument is but one of the many factors constituting, as a whole, "effective representation of counsel" which this Honorable Supreme Court has, from time to time, examined. The absolute right to oral advocacy before Courts of the United States, in criminal cases, is indubitable, having already been well established by decisions of this Honorable Supreme Court as well as the Circuits. See *Herring v. New York*, 422 U.S. 853 (1975). The Sixth Amendment to the Constitution of the United States provides a citizen a constitutional right to representation by counsel which has never been seriously challenged by this Court. However, the Supreme Court has never clearly espoused the rule of law that oral argument is an absolute right in civil cases. This Court has stated "The constitutional right of a Defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor. *Herring*, supra, 422 U.S. 860.". Logically, this rule, which applies to criminal cases, should be extended to include all cases of civil nature arising under the laws of the United States or any of its states or territories.

Emphasizing further the need for such a ruling on the part of this Court, are several decisions of the United States Court of Appeals for the Fifth Judicial Circuit. In *Peckham v. Family Loan Co.*, 262 F.2d 422 (C.A. 5, 1962) and *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al*, 431 F.2d 409 (C.A. 5, 1970), a Court of Appeals has taken the position, contrary to the spirit of decisions by this Court, that oral argument is a privilege in a nonjury case and not a right. Further, that the matter of permitting argument is within a trial court's discretion. It seems clear that the above decisions are out of step with the basic premise, apparently held by this Honorable Supreme Court, that litigants are most effectively represented where advocacy "in brief" does not displace the well exercised right of oral argument.

Denial of oral argument on appeal further runs counter to Rule 34(b) of the Federal Rules of Appellate Procedure which states "Unless otherwise provided by a rule for all cases or for classes of cases, each side will be allowed thirty minutes for oral argument". In the Court of Appeals below, the Petitioners herein were made

victims of a summary denial of oral argument perpetrated upon them by the Justices of the United States Court of Appeals for the Fifth Judicial Circuit. Apparently, due to the everpresent desire on the part of the Courts of Appeals to speed along their dockets, the Petitioners herein were denied such argument in order to "shorten their day in Court". Petitioners respectfully urge that by eliminating fundamental rights to oral advocacy commensurate with, and attendant to, the exercise of a citizen's Sixth Amendment rights, the "day in Court" contemplated by the Constitution of the United States has been denied altogether in the instant case below.

This Honorable Supreme Court should take note that there is substantial conflict in the Circuit Courts of Appeals of the United States concerning the propriety of denying oral argument, as well as the legality of doing so. The United States Court of Appeals for the Second Judicial District has rejected the denial of oral argument expounded by the Appellate Justices sitting in New Orleans, Louisiana. Also, up until the present date, no challenge has been made to this practice, either in the Courts or by the executive, that the Petitioners herein are aware of. There is a clear necessity for a ruling from this Honorable Supreme Court clarifying the Sixth Amendment right to oral argument in a civil case. Unless this practice is severely curtailed, the profound and attendant change in our legal system may well chill the exercise of the fundamental Sixth Amendment right to counsel guaranteed by the United States Constitution.

II.

AN ORDER DENYING ALL RELIEF REQUESTED IN A MOTION FOR RETURN OF SEIZED PROPERTY, FILED PURSUANT TO RULE 41(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, IS APPEALABLE IN THE ABSENCE OF ANY FORMAL CRIMINAL CHARGES AGAINST THE MOVANTS OF SAID MOTION AT THE TIME OF APPEAL.

In the decision below, the Court of Appeals dismissed the Petitioners' Appeal on the grounds that an Order denying relief on a Motion described above was not appealable. As the Court stated in its opinion, "We have interpreted DiBella broadly, holding that only if the Motion is "a collateral attempt to retrieve property and not an effort to suppress evidence in related criminal proceedings is it appealable." *United States v. Glassman*, 533 F.2d 262 (C.A. 5, 1976). See *Simons v. United States*, 78-1973 (C.A. 5, March 30, 1979).

In *Gottone v. United States*, 345 F.2d 165 (C.A. 10, 1965), the Tenth Circuit ruled that an Order on a Motion to Return Property and Suppress Evidence was appealable if there was no criminal proceeding against the Movant "in esse". In direct conflict with the position of the Fifth Circuit, the Court went on to state "Since the Motion is not made in nor dependent upon a case "in esse", the District Court's denial of such motion is an appealable order, citing *Gobart Importing Co. v. United States*, 282 U.S. 344, 356, 51 S.Ct. 153, 75 L.Ed. 374, and WITHIN THE EXCEPTIONS SET FORTH IN *DIBELLA V. UNITED STATES*, 369 U.S. 121, 131-132, 82 S.Ct. 654, 7 L.Ed.2d 614.".

The crucial rationale upon which the decisions of the various circuits, now in conflict, turn is the language of this Honorable Court in the *DiBella* opinion. This Honorable Supreme Court, in considering the finality of an Order on a Motion for Return of Seized Property for appeal purposes stated that the Order was appealable only if "the Motion is solely for the return of property and is in no way tied to a criminal prosecution in esse against the Movant." See *DiBella v. United States,* 269 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962). Petitioners respectfully aver that this Honorable Court should grant certiorari for the purpose of illucidating the language of *DiBella* which has engendered judicial confusion for lo these many years. If this confusion may be set to rest, the interest of judicial economy will be well served.

III.

A CIRCUIT COURT OF APPEALS OF THE UNITED STATES MAY NOT REFUSE TO ADDRESS A CONSTITUTIONAL ISSUE WHEN PROPERLY RAISED ON APPEAL.

At every level in the Courts below, Petitioners herein continually asserted the unconstitutionality of Title 26 U.S.C. § 7609 as applied by the United States and its agents. The chief concern of the United States Court of Appeals for the Fifth Judicial Circuit seemed to be to avoid deciding the above issue, on its merits, at all costs. It is well settled law that a United States Circuit Court of Appeals must determine all questions properly raised by a party before it. See *Leahy v. United States,* 272 F.2d 487 (C.A. 9, 1959). It would also seem that

the guarantees of due process attendant to the Fifth Amendment of the United States Constitution require appellate action similar to that delineated in the *Leahy* rule set out above.

Petitioners aver that, as to the claims of unconstitutionality of the statute referred to above, their case is one of first impression. Apparently for that reason, the Court of Appeals below as well as the District Court and Magistrate, were determined to avoid ruling on the issue if at all possible. As a Court of last resort, this Honorable Supreme Court can entertain no such obfuscation. Petitioners herein submit that it is the better rule of law that unconstitutional legislation is void and may be attacked anywhere at any time.

IV.

CONGRESS CANNOT PROVIDE, BY LEGISLATION, STATUTORY REMEDIES AND ADMINISTRATIVE SAFEGUARDS FOR TAXPAYERS USING BANKS, CREDIT CARD COMPANIES, ATTORNEYS, AND ACCOUNTANTS AS THIRD-PARTY RECORD KEEPERS, UNDER 26 U.S.C.A. 7609, AND DENY THE SAME STATUTORY REMEDIES AND ADMINISTRATIVE SAFEGUARDS TO TAXPAYERS UNFORTUNATE ENOUGH TO HAVE EMPLOYERS, THUS INVIDIOUSLY DISCRIMINATING AGAINST THOSE TAXPAYERS UNFORTUNATE ENOUGH TO HAVE EMPLOYER THIRD-PARTY RECORD KEEPERS.

The Magistrate, District Court, and Court of Appeals refused to recognize Petitioners' rights to the same statu-

tory remedies and administrative safeguards given other taxpayers under 26 U.S.C.A. 7609. By so refusing, the lower Courts denied Petitioners equal protection of the law and set up a favored class of taxpayers, thus invidiously discriminating against Appellants in a manner repugnant to the equal protection of the law requirements imposed upon the judicial, executive, and legislative branches of the United States federal government under the due process clause of the Fifth Amendment to the United States Constitution. This ruling cannot stand, for if it does it will result in legal and judicial discrimination against taxpayers who, for whatever reason, do not use banks, and cannot afford attorneys, accountants, or credit cards. The District Court, its Magistrate and the Court of Appeals, refused to extend the administrative safeguards and statutory remedies set out in 26 U.S.C.A. 7609 to employees. Under this application and interpretation of the statute in the Fifth Judicial Circuit, employees are denied the right to challenge a summons served by the commissioner upon their third-party record keeper/employer. Unless the application and interpretation of this statute by the Courts within this judicial circuit is erroneous, Congress, in passing this statute, provided selected protection for a few privileged taxpayers in a manner repugnant to the Constitution. Appellants allege that they have the same rights to statutory remedies, administrative safeguards, and judicial review, as any other taxpayers. Unless the United States Supreme Court acts to counteract the rulings of the lower Courts complained of herein, Petitioners, and those similarly situated, will be denied equal protection of the law by the United States government. This United States Supreme Court, by its inaction, will have abetted a scheme whereby Internal Revenue Service investigations will center on the employees, defenseless under the statute complained of, while those citizens wealthy enough to avail themselves of the protected "areas of activities" delineated by the statute complained of will be able to shield themselves from such inquiries, unless, of course, the service obtains Court enforcement of the summons issued. Thus, the United States Supreme Court should strike down the statute complained of, and render it null and void as being repugnant to the United States Constitution.

V.

THE DISTRICT COURT, CARL O. BUE, AND ITS MAGISTRATE ERRED IN HOLDING THAT THE PHRASE "OTHER EMPLOYMENT RECORDS" IN THE SUMMONS COMPLAINED OF WAS NOT IMPERMISSIBLY BROAD UNDER AMENDMENT FOUR OF THE UNITED STATES CONSTITUTION.

The Fourth Amendment of the United States Constitution places limits on warrants for the seizure of items of personal property owned by citizens of the United States. A summons has been construed by this Supreme Court to be nothing more than an administrative warrant, issued without necessity for any execution on its face by the United States District Court. The rationale behind this application and construction has been to the effect that any abuse of the commissioner's subpoena power may be reviewed and remedied by a District Court in a subsequent enforcement proceeding. The strict confines of Amendment 4 require that the warrant set out "particularly the person or things to be seized". The tenor

of this requirement was done great violence in the Courts below. Unless this requirement, imposed by the Constitution, is enforced, citizens of the United States would be subjected to unreasonable seizures perpetrated upon them by overzealous revenue agents, usurping the proper functions of the Judges and Magistrates of the United States which were once in the Court's exclusive province. The administrative summons served by the Internal Revenue Service, on behalf of the United States, in its tenor, required production of "other employment records". It is clear that that phrase is vague, and constitutes an attempt to enforce production of records not specifically demanded in the summons. The Magistrate, Norman Black, claimed, on the record, that nothing could be more specific than the phrase "other employment records". The holding that such language was specific enough to particularly identify the items or things to be seized pursuant to the summons was clear error, as was the Court's ruling that the summons was entitled to enforcement as to all employment records in the hands of third-party record keeper, Southwest Drywall, Inc. Petitioners submit that enforcement of such language by the Courts of Appeals and this Honorable Supreme Court would destroy the sanctity of the specificity requirement of the Fourth Amendment and lead to a situation where all an employees records would be produced to the service irrespective of their relevance to the investigation being conducted. Such broad language is tantamount to the contents of the hated "bills of attainder" which our ancestors railed against so long ago.

VI.

THE DISTRICT COURT, CARL O. BUE, AND THE COURT OF APPEALS, ERRED IN HOLDING THAT A HEARING ON A MOTION FOR RETURN OF SEIZED PROPERTY, PURSUANT TO RULE 41(e), FEDERAL RULES OF CRIMINAL PROCEDURE, WAS A REMEDY FOR PETITIONERS HEREIN EQUIVALENT TO THEIR INTERVENTION AT AN ENFORCEMENT PROCEEDING UNDER 26 U.S.C.A. 7602.

The novel contention of the District Court delineated above was apparently adopted by the Court of Appeals. The studied inaction and apathy of the Appellate Court to the denial of Petitioners rights was demonstrated by the dismissal, by summary opinion, of Petitioners' appeal. According to this rationale, the commissioner may seize taxpayer property without regard to the constitutional rights of the taxpayers against self-incrimination and unreasonable search and seizure as long as the taxpayers have the opportunity, in some forum, to attempt to force the commissioner to regurgitate them at some future time. The clear intent of Congress, in passing 28 U.S.C. 7602, was to provide a means whereby taxpayers could challenge the enforcement of a summons *before* the books and records actually had to be produced. The passage of 26 U.S.C. 7609 was a further attempt by Congress to extend safeguards of taxpayer privileges in this area. The damage to these civil rights of taxpayers which Congress tried to avoid by passing these statutes would be completely frustrated if the taxpayers only remedy, in the face of illegal seizure of his property, was a Motion for Return of Seized Property as docketed and heard by the District Courts of the United States under the Federal

Rules of Criminal Procedure, Rule 41(e). It is clear from both the intent of Congress and holdings by the Supreme Court of the United States that if the books and records of the taxpayer were privileged, then their production should not and cannot legally be enforced in the Federal Courts of the United States. The Petitioners submit that the intent of Congress, to prevent illegal seizures by the service under color of summons, has been severely frustrated in their case below. Since *Reisman v. Caplin,* 375 U.S. 440, (1964), the right of the taxpayers to an *opportunity* to intervene in a summons proceeding, prior to the enforcement of the summons by a United States District Court, where a summons is served on third-party record keeper, has been unquestioned. The lower Courts missed the mark in applying the *Reisman* rule under the mistaken assumption that the rule had been superseded by *United States v. Donaldson,* 400 U.S. 517, 91 S.Ct. R. 534. The *Reisman* and *Donaldson* rules are distinct, the latter governing the propriety of enforcing a summons where a pending criminal investigation is already underway prior to service of the document. The two rules are distinct since *Reisman* allows the opportunity to taxpayers interested in records of third parties to intervene in summons enforcement proceedings brought against such third parties. It is clear from the application of *Reisman* by this Court and other Courts of Appeals that the taxpayers will not be denied the opportunity to prove their interest in such records. *Reisman* does not mandate that an intervening taxpayers' records in the hands of a third-party record keeper be declared privileged or protected.

The privileges of the intervening taxpayers in records in the hands of third parties are to be determined *before*

enforcement of a summons, not after. To hold otherwise would repeal, by implication, 26 U.S.C. 7602 and 7609 which established, by a clear intent of Congress, that the above rule is not to be violated.

VII.

PETITIONERS' RIGHTS UNDER THE INTERNATIONAL BILL OF HUMAN RIGHTS AND THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN WERE VIOLATED SINCE THE UNITED STATES GOVERNMENT ATTEMPTED TO OBTAIN CONVICTIONS OF PETITIONERS FOR ALLEGED NONPOLITICAL OFFENSES, EXCLUSIVELY DUE TO PETITIONERS' POLITICAL ACTIVITIES.

Throughout this case, Petitioners have steadfastly availed themselves of the protection of the rights set forth in the Constitution of the United States and amendments attached thereto. Article Six of the United States Constitution, the second paragraph, reads as follows: "This Constitution, and the laws of the United States which shall be made pursuant thereof; and all treaties made, or which *shall be made, under the authority of the United States, shall be the supreme law of the land . . .*". In *Missouri v. Holland,* 252 U.S. 416 (1920), Justice Holmes ruled that the power of the Federal Executive to conclude treaties on matters falling within the reserved areas, although in domestic law, should be upheld. Through *U.S. v. Schooner Peggy,* 1 Cranch 103 (1801), Chief Justice Marshall stated: "The Constitution of the United States declares that treaty be the supreme law of the land. Of consequence, its obligations on the Courts

of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and in general, superintended by, the executive of each nation; and, therefore, whatever the decision of this Court may be relating to the right of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted.".

Under the International Bill of Human Rights, Petitioners' rights have been grossly violated by the United States. The United States has subscribed to the protocols of said instrument by acts of President Carter. Article Six thereof states, "Everyone has the right to recognition everywhere as a person before the law.". Article Seven thereof states, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection, against any discrimination in violation of this declaration and against any incitement to such discrimination.". Article Eight thereof states, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.". Article Twelve states, "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondents, nor to attacks upon his honor or reputation. Everyone has the right to the protection of the law against such interference or attacks.". Article Eighteen states, "Everyone has the right to freedom of thought, conscience, and to religion . . .". Article Nineteen states, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.".

The form of the procedure followed by the United States and its agents does not hide the substance of its acts, but they seek a means to punish Petitioners for their political activities by assertion of purported violations of non-political offenses. The harassment of Petitioners began after it became public record in 1977 that Petitioners were opposed to policies and activities of the United States; hence, at the very least, articles of the above-mentioned Treaties have been violated in the process by such acts of harassment, in order to stifle and inhibit any dissent against the illegal and oppressive acts of the United States against its citizens, although, at the same time, it persists in acting against alleged violations of human rights by other sovereign nations.

Similarly, Petitioners' rights under the American Declaration of the Rights and Duties of Man have been violated. The United States is a signatory of said instrument which was reaffirmed on June 1, 1977 by President Carter. Article Two thereof states, "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed, or any other factor.". Article Four thereof states, "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.". Article Five thereof states, "Every person has the right to the protection of the law against abuse of attacks upon his honor, his reputation, and his private and family life.". Article Eighteen thereof states, "Every person may resort to the Courts to insure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the Courts will protect

him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.". Article Twenty-Four thereof states, "Every person has the right to submit a special petition to any competent authority, for reasons of either general or private interests, and the right to obtain a prompt decision thereon.".

The procedure utilized by Respondent in its substance seeks a means to punish Petitioners for their political activities by the assertion of purported violations of non-political offenses. As previously stated, the harassment of Petitioners began after it became a matter of public record that Petitioners in 1977 publicly objected to policies and activities of the United States; hence, at the very least, the articles of the above-mentioned Treaties have been violated in the process, by such acts of harassment, in order to stifle and inhibit any disagreement with or dissent against the illegal and oppressive acts of the United States against its citizens, although at the same time it persists in acting against violations of human rights by the sovereign nations.

Petitioners have made and continue to make their demand that the United States honor the Treaties mentioned herein by granting Petitioners their remedies sought at the outset of this matter and further for the United States and its agents to cease their activities whereby they attempt to obtain punishment of Petitioners for their political activities by the imposition of purported violations of non-political offenses.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Writ of Certiorari should be granted as sought.

Respectfully submitted,

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Houston, Texas 77074

Dated: May , 1979

Service of the within and receipt of a copy thereof is hereby admitted this _____ day of May, A.D. 1979.

_____

_____

APPENDIX "A"

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION H-77-1448

Judge Carl O. Bue

NORMAN R. SIMONS, ET AL,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, ET AL,
Defendants

O R D E R

The recommendation of the Magistrate is adopted, and

It is Ordered that Plaintiffs' Motion for Return of Seized Property be denied, and

It is further Ordered that this case be dismissed.

DONE at Houston, Texas, this 30th day of December, 1977.

/s/ CARL O. BUE
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION H-77-1448

Judge Carl O. Bue

NORMAN R. SIMONS, ET AL,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, ET AL,
Defendants

FINAL JUDGMENT

From a consideration of the record in this Cause, it is the opinion of this Court that this action should be and is hereby dismissed.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this 30th day of December, 1977.

/s/ CARL O. BUE
United States District Judge

APPENDIX "B"

Amendment IV to the Constitution of the United States

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

APPENDIX "C"

Amendment V to the Constitution of the United States

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX "D"

Amendment VI to the Constitution of the United States

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

APPENDIX "E"

Amendment XIV to the Constitution of the United States

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States' nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

APPENDIX "F"

Norman R. SIMONS and Catherine Simons,
Plaintiffs-Appellants[1]

v.

UNITED STATES of America et al.,
Defendants-Appellees.

No. 78-1873

Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

March 30, 1979.

Taxpayers appealed from order of the United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., denying taxpayers' motion for return of records seized from taxpayer's employer and suppression of records in any further criminal proceeding. The Court of Appeals held that where taxpayers sought return of tax forms, expense checks and vouchers, payroll checks and other employment records kept in files of employer, motion was directed at suppression of evidence in criminal proceeding and was not collateral action for return of property, and thus order denying motion was nonappealable.

Appeal dismissed.

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1. This was the only judgment provided by Court to Plaintiffs-Appellants.

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

Appellants Norman and Catherine Simons became the subject of an IRS audit in 1977 concerning their income tax returns for 1975 and 1976. In August 1977 a criminal investigation began. The IRS served a summons for production of records on Mr. Simons' employer, Southwest Drywall, and sent appellants notice of the summons by certified mail. Appellants refused to pick up their mail and did not attempt to intervene in the summons procedure. Southwest Drywall complied with the summons. The appellants then filed a motion in the district court for the return of the seized records and their suppression in any further criminal proceeding. The district court upheld the legality of the summons and denied all relief.

[1] Under the standard set forth in *DiBella v. United States*, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962), the denial of the appellant's motion is appealable only if "the motion is solely for the return of property and is in no way tied to a criminal prosecution in esse against the movant." 369 U.S. at 131-32, 82 S.Ct. at 660, 7 L.Ed.2d at 621. We have interpreted *DiBella* broadly, holding that only if the motion is "a collateral attempt to retrieve property and not an effort to suppress evidence in related criminal proceedings is it appealable." *United States v. Glassman*, 533 F.2d 262 (5th Cir. 1976). In *Glassman* we held that denial of a motion for the return of property and suppression of evidence was

not appealable even in the absence of the existence of any formal criminal charges at the time of appeal. 533 F.2d at 263. *See also United States v. Peachtree*, 456 F.2d 442, 447-48 (5th Cir. 1972).

[2] The "property" which the appellants seek returned in this case consists of W-2 and W-4(e) forms, expense checks and vouchers, payroll checks, and other employment records, all kept in the files of Mr. Simons' employer. It is obvious that the appellants' motion is directed at the suppression of this evidence in any criminal proceeding arising from the IRS criminal investigation and is not a collateral action for the return of property. The district court's order is nonappealable, and we therefore dismiss for want of jurisdiction.

APPEAL DISMISSED.

Supreme Court, U. S.
FILED
JUL 20 1979
MICHAEL RODAK, JR., CLERK

No. 78-1783

In the Supreme Court of the United States

OCTOBER TERM, 1978

NORMAN R. SIMONS AND CATHERINE SIMONS,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1783

NORMAN R. SIMONS AND CATHERINE SIMONS,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of the decision below holding nonappealable an order dismissing their motion to compel the return of property turned over to the Internal Revenue Service by petitioners' employer and to suppress the use of this material as evidence against petitioners in any criminal proceedings.

The pertinent facts may be summarized as follows: In August 1977, the Internal Revenue Service was conducting an audit of petitioners' civil tax liability and investigating possible criminal violations. In compliance with an Internal Revenue Service summons, petitioner Norman R. Simons' employer, Southwest Drywall, voluntarily turned over certain of its records pertaining to petitioner's employment. Although the Internal Revenue

Service sent petitioners notice of the summons by certified mail, petitioners refused to pick up their mail and never attempted to intervene in the summons proceeding. Thereafter, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, petitioners filed a motion in the United States District Court for the Southern District of Texas seeking the return of the records and the suppression of their use as evidence in any criminal proceeding against petitioners (Pet. App. 28). After an evidentiary hearing, the district court found the summons to have been validly issued and denied petitioners' motion (Pet. App. 23-24). The court of appeals dismissed the appeal for lack of jurisdiction (Pet. App. 29).

1. Petitioners first contend (Pet. 6-8) that the court of appeals' failure to set their case for oral argument denied them their Sixth Amendment right to counsel. But the court of appeals placed this case upon the summary calendar to be decided without oral argument only after the observance of a careful procedure designed to safeguard procedural due process. See *George W.B. Bryson & Co.* v. *Norton Lilly & Co.*, 502 F. 2d 1045, 1051 (5th Cir. 1974).[1] There is no constitutional impediment in such a procedure. Apart from the fact that the Sixth Amendment is applicable only to criminal prosecutions (see, *e.g.*, *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977)), there is no constitutional requirement that oral argument be heard in every case in the courts of appeals. *Communications Comm'n* v. *WJR*, 337 U.S. 265, 274-277 (1949). See also *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972).

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[1]Although petitioners represent (Pet. 6) that both parties specifically requested oral argument, the government did not in fact request such argument. In compliance with Local Rule 13 of the court of appeals, the government informed the court that oral argument "may be helpful" (Appellee's Br. i).

2. Petitioners further argue (Pet. 9-10) that the court of appeals erred in dismissing their appeal for lack of subject matter jurisdiction. But the court correctly recognized that under the standard set forth in *DiBella* v. *United States*, 369 U.S. 121 (1962), an order granting or denying a pre-indictment motion to suppress is not a final appealable order. Hence, the denial of a motion made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure is appealable only if the motion is solely for the return of property and is in no way tied to a criminal prosecution *in esse*. (*Id.* at 131-132). The question whether a motion is one solely for the return of property is to be resolved by examining its "essential character and the circumstances under which it is made." *Cogen* v. *United States*, 278 U.S. 221, 225 (1929); *United States* v. *Premises Known as 608 Taylor Ave.*, 584 F. 2d 1297 (3d Cir. 1978). Thus, where the property in issue belongs to the movant who seeks the return of the property, the courts of appeals have exercised their jurisdiction to review the denial of such motions. See, *e.g.*, *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F. 2d 175 (7th Cir. 1978); *United States* v. *Premises Known as 608 Taylor Ave., supra*; *Richey* v. *Smith*, 515 F. 2d 1239 (5th Cir. 1975); *Gottone* v. *United States*, 345 F. 2d 165 (10th Cir.), cert. denied, 382 U.S. 901 (1965); *Coury* v. *United States*, 426 F. 2d 1354 (6th Cir. 1970).

But here, petitioners have no property interest in the materials they seek to have "returned." The records in question belong to Southwest Drywall. Hence, the essential character of petitioners' motion was only for the suppression of the use of the materials in any future criminal proceeding (Pet. App. 29). The district court's denial of such a motion was not a final order and was

therefore not appealable under *DiBella*.[2] See also *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359 (1977). The court of appeals therefore correctly dismissed the appeal for lack of jurisdiction.

At all events, the summons of the records of petitioner's employer relating to his employment was entirely proper. See *Donaldson* v. *United States*, 400 U.S. 517 (1971); *United States* v. *Miller*, 425 U.S. 435 (1976)).

It is therefore respectfully summitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JULY 1979

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[2]For this reason, contrary to petitioners' assertion (Pet. 9), there is no conflict between the result reached in this case and *Gottone* v. *United States*, *supra*. Both the Fifth and Tenth Circuits recognize that, in the absence of criminal proceedings, the denial of a motion for the return of seized property is subject to appellate review. *Mr. Lucky Messenger Service, Inc.* v. *United States*, *supra*; *Gottone* v. *United States*, *supra*.

DOJ-1979-07